JD–20—10
Richmond, VA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MANNING CONSTRUCTION, INC.

and Case 5-CA-35045

BRICKLAYERS and ALLIED CRAFTWORKERS,
LOCAL 1, MARYLAND, VIRIGINIA, and DC

Jasper C. Brown Jr., Esq. and
Synta E. Keeling, Esq., for the General Counsel.
D. Eugene Webb Jr., Esq., of Richmond, Virginia,
for the Respondent.[1]

DECISION

Statement of the Case

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Richmond, Virginia, on November 18 and 19, 2009.[2] The initial charge was filed on June 5, an amended charge followed on July 9, and the complaint was issued on August 31.

The complaint alleges that the Employer, Manning Construction, Inc., through its supervisors, interfered with, restrained, and coerced its employees by instructing them not to speak with representatives of the Union and by informing one of those employees that he was being discharged for speaking to such representatives. This conduct is contended to have violated Section 8(a)(1) of the Act. In addition, the complaint alleges that the Employer discharged two of its employees, Jaime Saldivar and Fredy Buezo, because those employees engaged in protected union activities and in order to discourage employees from engaging in such activities. These actions are alleged to have violated Section 8(a)(3) and (1) of the Act. The Employer filed an answer denying the material allegations of the complaint.

For the reasons described in detail in the following decision, I find that the Employer did interfere with, restrain, and coerce its employees by engaging in certain of the conduct alleged by the General Counsel. I further conclude that other conduct that is claimed to have similarly violated the Act has not been proven. Finally, I have determined that the General Counsel has met his burden of establishing that the Employer did terminate the employment of Saldivar and Buezo because of their involvement in protected union activities. In consequence, I conclude that certain of the Employer's conduct violated Section 8(a)(1) and (3) of the Act.

On the entire record,[3] including my observation of the demeanor of the witnesses, and

[1] Officials of the Charging Party testified in this case, but elected not to participate as formal representatives.

[2] All dates are in 2009, unless otherwise indicated.

[3] The transcript of the trial proceedings is quite accurate. However, at Tr. 147, L. 12, I am

Continued

after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Employer, a corporation, is engaged in the commercial masonry construction business at its facility in Highland Springs, Virginia, where it annually provided services valued in excess of $50,000 for Purcell Construction, an enterprise within the Commonwealth of Virginia, which is directly involved in interstate commerce by virtue of its contracts, valued in excess of $50,000, with the Department of the Army, an agency of the United States Government, at Fort Lee, Virginia. The Employer admits[4] and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

The Employer is a Virginia corporation founded by Michael Manning in 2003. Manning continues to serve as the Company's chief executive officer and "overall operations manager." (Tr. 19.) As he described the firm, it is a "commercial masonry contracting business" engaged in the construction of "schools, prisons, army bases, [and] federal type work." (Tr. 18.) Much, if not all, of the Company's work is performed on projects for the Federal, State, and local governments.

The evidence established that, in terms of the regional economy of central Virginia, the Employer is a very substantial enterprise. During the period at issue in this case, it had a broad variety of projects throughout the region. Manning testified that, during the spring and summer of 2009, the Company was engaged in the construction of a jail in Chesterfield County, a heating plant at a college in Farmville, a sewage treatment plant in Orange, and a job for the Navy at the Dahlgren Naval Base. He characterized these projects as "major" while noting that the Company also had smaller projects during this period.[5]

Of particular concern to this litigation, another major component of the Company's workload during the period at issue involved construction projects at Fort Lee, a large military base located near Petersburg, Virginia. Manning reported that the Company was involved in the construction of over 20 buildings at the fort, including one project at the North Range of the fort. More importantly, it was engaged in two large projects that form the primary settings for the events in this case. The first of these involved masonry work at a facility known as the Central Campus. This was a very large installation that consisted of a "research, development, and tank construction" complex including warehouses and shops. (Tr. 21.) The work at Central

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quoted as admonishing counsel not to "read." I actually told counsel not to "lead" the witness. Any other errors of transcription are not significant or material.

[4] See, the answer to the complaint at pars. 3, 4, 5, and 6. (GC Exh. 1(g).)

[5] I have provided a description of the scope of the Employer's activities because this illuminates the necessary context within which to view the Employer's lack of documentation of its personnel activities and practices. The significance of this matter will be addressed in detail during the legal analysis portion of this decision.

Campus was being provided by Manning under the direction of a general contractor, Balfour Beatty Construction. The ultimate client was the Army Corps of Engineers.

The second major project involved in this case was the construction of a barracks complex at Fort Lee designed to provide accommodation for Advanced Infantry Training (AIT). The general contractor at AIT was the Purcell Corporation. Once again, the ultimate client was the Army Corps of Engineers.

Manning testified that he was awarded the contracts for Central Campus and AIT in June 2008. Work on both jobs began in September and reached its height of activity in the spring of 2009. Manning testified that during the months of March and April, the Company employed 40 to 60 people at Central. Of these, over 20 were bricklayers. As to AIT, there were 40 to 50 employees, with 18 to 20 consisting of bricklayers.

The Employer's witnesses described the Company's operations at its projects as being characterized by informality and flexibility. Each project was run by a superintendent who exercised very broad authority. Direct supervision of the bricklayers and laborers was provided by foremen who reported to the superintendent. These foremen were also vested with wide latitude in exercising their supervisory responsibilities. Manning testified that they had the power to hire, fire, and lay off employees. The Company did not maintain any formal policies to guide these practices and also did not possess written disciplinary standards or procedures.[6] The Company's witnesses provided consistent testimony that Manning, himself, was not actively involved in issues of hiring, discipline, lay off, or termination of individual employees.

Apart from Manning, four of the Company's supervisory personnel who were involved in the matters being examined provided testimony at trial. Douglas Miller has been employed as a foreman by the Company since 2007.[7] In September 2008, he was assigned as a supervisor on the AIT project. Gavin Czeizinger has been employed by Manning since 2008. He is currently working as a foreman for the Company on a project at Fort Pickett. Previously, he had served in the same capacity on various projects at Fort Lee, including Central Campus and AIT. Among the Company's Latino employees, he is referred to as "Gabino." Mark Tester is a superintendent who has very extensive experience in the masonry business and has worked for Manning for the past 3 years. Among his projects for the Company was the AIT barracks. Finally, Benedicto Torres has been employed by Manning since 2001. He served as a foreman on the Central Campus job.[8]

In addition to supervisory employees, two of the Employer's former bricklayers played a major role in the events of this case. Jaime Saldivar was hired as a bricklayer in February 2007. He worked on three of the Company's projects, including Fort Lee. Fredy Buezo began working for Manning as a bricklayer in September 2007. He worked at four jobsites, including both of the major projects at Fort Lee. The Company terminated the employment of each of these men on April 24, 2009.

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[6] In his opening statement, counsel for the Employer characterized the Company's operations as "about as informal as any company that you've probably had a case involved. They have no personnel files. Employees do not fill out employment applications. All of the hiring is done on the site under the authority of the person that's in charge of that jobsite, which is often a superintendent and sometimes it's a foreman." (Tr. 173.)

[7] At the time he testified, he reported that he had been in lay off status for 4 days.

[8] The Company agreed that all four of these men possessed supervisory authority within the meaning of the Act. See the Employer's answer to the complaint at par. 7. (GC Exh. 1(g).)

In the fall of 2008, the Bricklayers and Allied Craftworkers, Local 1 (the Union), commenced an organizing campaign among the employees of the Company. These efforts were conducted at all of the Employer's active worksites, including those at Fort Lee. Three union representatives led this effort, Paul Painter, Jose Alvarez, and Umberto Parada. Painter testified that the primary tactic involved in this campaign was a regular pattern of visits to the employees' parking lots at each jobsite. He reported that, "[w]e'd visit the jobsites in the morning before the guys started work, on their break, lunchtime, and after work as they were getting off work." (Tr. 68—69.) He indicated that such visits were made as often as 2 or 3 times daily. One of the purposes of this activity was to solicit authorization cards from the employees.

On May 11, 2009, the Union filed a petition seeking a representation election. (GC Exh. 7.) An election was held on June 12, 2009. The Union did not prevail in this election.

B. Events in Controversy

The General Counsel contends that certain of the Employer's actions taken during the course of the Union's organizing campaign constituted violations of the Act. As a result, it is necessary to describe the pertinent events of that campaign.

As previously indicated, the Union's officials testified that they began their organizing effort in the fall of 2008. A primary activity involved the attempt to speak with the Employer's bricklayers in the parking lots associated with the Fort Lee construction projects. For example, Parada testified that he and Painter were at the parking lot for the Central Campus project on November 11, 2008. His records indicate that they visited the site from 6:30 to 7 a.m. (GC Exh. 12, p. 1.) While his main purpose was to organize the work force, Parada also wished to solicit employment from the Company for several of his family members who needed jobs. In this regard, he spoke to Foreman Torres. Without identifying himself as a union representative, Parada asked Torres about work opportunities. Parada testified that Torres told him to telephone him about jobs in a couple of days. He furnished Parada with his telephone number.

Parada's detailed report of his activities for the Union indicates that he and Painter returned to the jobsite at 9 a.m. and spoke to employees about the Union. He testified that Torres approached him and asked if they had obtained permission to be present on the site from the general contractor. He told Torres that he had not sought such permission because there were no signs posted that prohibited the presence of the Union's representatives. On hearing this, Torres telephoned the general contractor. Subsequently, the contractor's personnel told Parada and Painter to leave the premises. They complied.[9]

In his testimony, Torres denied having any conversations with Parada and reported that he first learned of the Union's organizational campaign when he was asked to distribute pamphlets to the employees that outlined the Company's opposition to the Union. It is undisputed that these materials were not distributed to employees until shortly before the election in June 2009.[10]

[9] Parada's report describes this event: "We stop talking with the workers because the Latino foreman name Benedicto, contact #804-XXX-XXXX. This man call the [general contractor], and the GC send Paul and I, go home or we will be in problem we left that is why we don't have more cards signed." (GC Exh. 12, p.1.) As is evident, I have deleted the telephone number out of concern for Torres' privacy.

[10] The first such written communication was dated May 15, 2009. (GC Exh. 2.)

In resolving this credibility issue, I rely on several significant factors. In the first place, Parada provided contemporaneous documentation of his activities on that day. That report (GC Exh. 12) furnishes complete corroboration of his account. I was impressed that the report contains a telephone number asserted to belong to Torres. Although Torres testified, he did not dispute that this was his number. While it is conceivable that Parada obtained the number from other sources, its inclusion on his report of that day's activities is probative evidence that Torres provided him with his phone number during their initial conversation.

While Parada's account is impressively corroborated by his contemporaneous report, Torres' blanket denials are inherently implausible. He contended that he was entirely ignorant of the Union's campaign despite the fact that there was clear evidence demonstrating that the Union's representatives made regular and frequent visits to the parking lot. I find it highly unlikely that their routine presence in the lot would have been overlooked by Foreman Torres. I must also note that Torres' claim of complete ignorance was consistent with similarly implausible claims by the other supervisors who testified. Tellingly, the contention that the Union's activities in the parking lots were not obvious to persons working at the two jobsites is belied by Manning himself. In his letter to his employees dated May 15, he begins by observing that, "[i]f you have not already heard through the grapevine," and goes on to confirm that the Union was seeking to represent the Company's bricklayers. This represents recognition that the Union's open activities would certainly be expected to have come to the attention of the persons who were working at the affected jobsites. I credit Parada's corroborated account and reject Torres' inherently illogical claim of ignorance.

Similarly, I also credit Parada's testimony that he spoke to Torres by telephone on December 2, 2008. In that conversation, Parada told Torres that union officials were going to speak to employees before and after their shifts and during lunchtime. Torres expressed his assent but voiced the concern that they not interfere with employees who were on work time. Parada reported that he then passed the phone to Painter who also spoke with Torres. Parada's account was corroborated by Painter who testified that he asked Torres to help him obtain access to the bricklayers. Torres declined this request.

This evidence establishing that Torres was aware of the Union's activities in the fall of 2008 was also supported by Buezo. He reported that during this period, he had a conversation with Torres in the parking lot. At that time, Torres warned him that, "anybody who had signed the card for the Union, he was going to fire him." (Tr. 92.)

Torres' professions of ignorance were also undercut by testimony from Saldivar. He reported that he had discussions with the Union's organizers in January 2009. Subsequently, at a meeting of employees conducted by Torres, he took the occasion to ask Torres "why the company didn't want us to talk with the people from the Union." (Tr. 130.) He reported that this provoked an angry response from Torres. He also testified that, one morning during that month as he was reporting for work, Torres confronted him, warning that "if we were going to keep on talking with the people from the Union, he would probably fire us." (Tr. 131.)

Further evidence as to the state of Torres' knowledge of organizing activity was provided by Alvarez. He testified that during February he joined his fellow union representatives in their organizing activities at the parking lots of both Central Campus and AIT. He reported that the three organizers stationed themselves in the parking lots approximately every other day during the period from February to May. Among those employees who regularly engaged in conversation with them were Buezo and Saldivar. Alvarez further testified that at various times during this period, he observed Torres, Tester, and Miller watching the organizing activity.

Yet more evidence regarding the state of Torres' knowledge was provided by Painter. He testified that, on March 5, he reported to the parking lot at Central Campus to meet with employees. He was accompanied by Parada and Alvarez. As they were speaking to several employees, including Saldivar, Torres drove past them in a company van.[11] Both Alvarez and Saldivar also testified about this incident. Alvarez reported that Torres parked the van approximately 3 to 4 parking spaces from the location of the organizers. As Torres observed through the van's side window, Saldivar signed an authorization card and then shook Alvarez's hand. This was confirmed by Saldivar who testified that Torres watched him from his location inside the van as he signed an authorization card. The General Counsel introduced the authorization card signed by Saldivar on that date. (GC Exh. 9.)

Just over a week later, on March 19, the three organizers were again present at Fort Lee. Alvarez testified that they arrived in the parking lot at AIT around 6:30 a.m. They engaged in conversation with employees, including Buezo. During this conversation, Alvarez heard loud shouting. The speaker was Foreman Miller. He twice asked Buezo, "What the fuck are you doing?" (Tr. 160.) Alvarez reported that Miller pointed at the group of them while making these angry remarks. In response, Alvarez told Buezo, "Fredy you better go. Looks like he needs you." (Tr. 160.) Buezo confirmed this account, reporting that as he was speaking to the organizers, Miller "yelled at me really bad . . . . He cursed at me . . . . What the fuck are you doing?" (Tr. 93.) Painter provided additional testimony regarding this event. He reported that it occurred at approximately 7:15 to 7:20 a.m., a few minutes before the start of the workday at the project. Miller yelled at Buezo in a loud voice and appeared to be angry at him.

As with the earlier incident involving Torres, Miller issued a sweeping denial of involvement in this behavior. He testified that he never yelled at Buezo, never yelled at any employee in the parking lot, and never addressed Buezo regarding the Union. Indeed, he asserted that, "I didn't even know there was any union there." (Tr. 230.) As with Torres, I view this blanket profession of ignorance as inherently implausible. As Manning indicated, there was certainly a "grapevine" at the workplace regarding the organizing campaign, a subject that would obviously be of intense interest to both employees and supervisors. Beyond that, the evidence clearly establishes that organizing activity in the parking lots was a routine feature of life at these Manning projects during that springtime.[12] I credit the multiple, clear, and consistent accounts of Miller's conduct and reject his unsupported denial as constituting a fabrication.

As the Union's campaign continued, Buezo chose to sign an authorization card. He completed this form at the AIT parking lot on March 26, signing the card in the name of Rivera, his father's name. (GC Exh. 8.)

During this period, Saldivar had been assigned to the Central Campus project. On April 20, Torres informed him that he was being transferred to the Company's North Range jobsite at Fort Lee. He was the only person so reassigned on that date. Torres confirmed that he sent Saldivar to North Range "to help" with that project. (Tr. 292.)

It is undisputed that the culminating events involved in this litigation occurred on April 24,

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[11] Torres denied ever driving a company van in the parking lot. As with his blanket denial of knowledge of the organizing campaign, I find this inherently implausible given the testimony from multiple other witnesses who observed him operating a company van in the parking lot.

[12] In this connection, unlike his colleagues, Foreman Czeizinger conceded that he had observed union representatives engaged in organizing activities in the parking lot. See Tr. 262.

when both Saldivar and Buezo were terminated from their employment with Manning. On that day, Saldivar arrived for work at the North Range project. The foreman told him to report to Torres. He was unable to locate Torres but did find his assistant, a Mr. Marcos. Marcos told him, "I am very sorry, Jaime, but there is no more work for you." (Tr. 136.) Saldivar's description of this conversation is uncontroverted and I credit it.

On hearing this news from Marcos, Saldivar telephoned Torres to ask why he was being terminated. He testified that Torres told him, "in this company we don't have no more work for you." (Tr. 136.) Indeed, he added, "I'm going to talk to the other foremen in the company, and I'm going to tell them not to give you any more work." (Tr. 136.) On hearing this, Saldivar hung up and left the premises. Once again, Saldivar's description of these events is uncontroverted and I find it reliable.

Buezo testified that he reported to work at AIT at 7:30 that morning. Gabino told him to "pick up my tools and leave." (Tr. 102.) Buezo testified that he asked for the reason and Gabino asserted that, "I had done some work, that it was not good." (Tr. 102.) Buezo reported that he sought further explanation of the decision to fire him. Although the testimony from those involved was somewhat unclear, it appears that he attempted to question both Miller and Tester regarding his termination. He reported that he was merely "waved" away. (Tr. 102.) Miller indicated that he told Buezo that his discharge was due to his history of bad workmanship, while Tester confirmed Buezo's description, describing their encounter as follows:

> He headed to me. And I saw him coming, and I told him—I went like this way.[13] I don't need to talk to you.

(Tr. 273.) Buezo persisted, pleading for his job. Tester declined to reconsider. At this juncture, Buezo retrieved his tools and departed.

On June 5, the Union filed the initial charge in this case, alleging that the terminations of Saldivar and Buezo were unlawful. The Regional Director issued the complaint on August 31. Since April 24, the Company has not employed either Saldivar or Buezo.

C. Legal Analysis

The General Counsel contends that certain statements made by supervisors constituted threats and coercion in violation of Section 8(a)(1). In addition, the General Counsel alleges that the discharges of Saldivar and Buezo on April 24 were discriminatorily motivated by those employees' union sympathies and activities in violation of Section 8(a)(3). I will assess each of these contentions in chronological order. Before doing so, I find it appropriate to discuss a rather unusual aspect of this case and its significance to my overall evaluation of the evidence.

[13] On the witness stand, both Buezo and Tester demonstrated Tester's hand motion to Buezo. The lawyers agreed with my proposed characterization of both demonstrations of that hand motion as being a "dismissive gesture." (Tr. 103, 273.)

1. The Employer's failure to produce documentary evidence to support its case

At the conclusion of the trial in this matter, I observed to the lawyers that the record "is marked by a dearth of documentary evidence." (Tr. 330.) In particular, the Employer did not seek to introduce a single document in support of its case. I went on to express confidence that "the Board has had things to say about under what circumstances it is appropriate and under what circumstances it is inappropriate to draw inferences about the state of the documentary record." (Tr. 330.) I asked the lawyers to discuss this topic in their briefs.

Both parties did address this matter in their briefs. In particular, counsel for the Employer drew my attention to an important distinction that should be drawn. As he explained,

> While there may be a general rule of evidence that an adverse inference may be appropriate to be drawn against a party when there is evidence that relevant documents actually exist and the party having custody of such documents does not produce or offer them in evidence,[14] there is no similar rule applying to or deriving from documents that have never existed.

(R. Br., at p. 18.) Thus, because the Employer did not create records "stating that an employee has been discharged, laid off or disciplined," no adverse inference should be drawn from its failure to place such documents into evidence. (R. Br., at p. 19.)

I have carefully considered the Employer's position and the policy concerns implicated in determining the effect to be given to the Employer's failure to produce any documentary evidence to support its defense. In the first place, I have no quarrel with counsel's argument that it would be improper to draw an adverse inference from the failure to produce records that have never existed. I credit the testimony that demonstrated that this Employer does not maintain disciplinary reports, employment applications, a handbook, and certain other commonly utilized personnel records. Even an employer as substantial as this one, a relatively large company that employs scores of workers on multiple simultaneous projects, has the right under our system of free enterprise to decide on the degree of documentation it wishes to create and maintain.[15]

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[14] Indeed, counsel for the Employer urged me to apply such an adverse inference against the General Counsel regarding Alvarez' testimony that the Employer hired bricklayers after discharging Saldivar. Alvarez reported that he had recorded the names of those bricklayers hired after Saldivar's discharge but his list of names was never introduced into evidence by the General Counsel. It was argued that the failure to introduce that document should lead me to "infer that any such documentation would not support his testimony." (R. Br., at p. 18.) In this particular instance, such an adverse inference would be inappropriate because the General Counsel did introduce the Company's own records that named the bricklayers that were hired after Saldivar's lay off. See GC Exh. 6. The Board declines to authorize the drawing of an adverse inference where a "satisfactory explanation" exists. *Martin Luther King, Sr., Nursing Center,* 231 NLRB 15, fn. 1 (1977), citing 29 Am. Jur. 2d § 178. Such an explanation is present here since Alvarez' list would merely be cumulative of the Employer's own records.

[15] Of course, I am speaking here of the requirements of the Act. Counsel concedes that there may be other Federal, State, or local laws that mandate the creation and retention of certain records for such purposes as tax filings, unemployment insurance, or workers' compensation.

Having acknowledged this Employer's right to operate with a minimum of documentation, the fact remains that this mode of operation involves both benefits and risks. While the Company's lack of documentation enhances its flexibility and reduces its administrative burdens and costs, it does produce consequences when the Employer becomes enmeshed in litigation, whether in the context of labor relations, employment law, or even contract disputes or tort claims. The possibility of such litigation is a readily foreseeable incident of modern business life. Equally foreseeable is the reality that when faced with such litigation, the Company will be unable to provide documentary evidence in support of its contentions. The lack of such documentation may hamper its ability to support its claims. Thus, for example, the Board has recognized that, in appropriate circumstances, "documentary evidence [is] entitled to greater weight than contradictory testimonial evidence." *Domsey Trading Corp.,* 351 NLRB 824, fn. 56 (2007). Where records exist that were created contemporaneously with events at issue in a lawsuit and those records are at odds with the subsequent testimony of interested individuals, it is not surprising that the documents will be given greater weight.

These considerations bring me to the recognition that, while the Employer has not engaged in any misconduct by failing to create certain commonly used personnel records, the fact remains that the absence of those records forces it to rely exclusively on the testimony of its supervisors. I cannot ignore the resulting circumstance that, in this case, the Employer's explanations of its actions are based entirely on the self-serving and partisan testimony of its supervisors and managers and are completely unsupported by any more impartial or objective corroboration such as is provided by records that were routinely created contemporaneously with the actions under review and before the commencement of litigation.

Beyond this general recognition regarding the state of the Employer's evidence, there exists yet another issue. While counsel for the Employer has focused on the fact that the Company chooses not to create and maintain certain records, he ignores the fact that the evidence demonstrates that the Company also failed to offer into evidence records that it did create. A salient example of this feature of the case was provided in Miller's testimony regarding an alleged disciplinary suspension of Buezo. He testified that, consistent with the Company's practices, there was no report regarding this suspension. As Miller explained, "[h]e was never written up, no, but the time sheet, the time would document if he was suspended or not." (Tr. 243.) In addition, Miller made the following observation, "I imagine Mark [Tester] wrote it in his diary as well." (Tr. 243.) Despite the fact that proof of Buezo's alleged suspension was a key feature of the Employer's defense to the General Counsel's unlawful termination charge, the Employer did not introduce any such timesheet. Nor did the employer offer Tester's diary. In this connection, it should be noted that Tester confirmed that, "I keep a construction diary." (Tr. 284.) He also reported that, ordinarily, that diary would contain disciplinary information, but he did not know whether it had an entry regarding a suspension of Buezo. In an attempt to be helpful, he also observed that such information "would be reflected on a time sheet also." (Tr. 284.) Of course, this testimony merely serves to underline the significance of the failure to produce either document.

Tester also provided testimony regarding another document with the potential to provide highly probative support to the Employer's contention that Buezo's termination was due to his repeated examples of poor workmanship. He reported that Buezo's work at the south elevation of the main entry to Building 1 was defective due to the manner in which the bond had been installed. As a result, the wall had to be torn down and replaced. When asked how he became aware of this faulty work, Tester reported that, "I was notified on paper by the Corps of Engineers on the bond there." (Tr. 275.) No such inspection report was introduced into the record despite its obvious value as corroboration of this testimony. Furthermore, Tester

asserted that there would be additional documentary support for his claim that he suspended Buezo for this episode of poor job performance. He explained, "you can probably reflect on time sheets, and that would probably show up there." (Tr. 275—276.) He elaborated, "[u]sually on the commentary or the—now there's a common area. If I lay off or suspend or fire, I write on there. Now, I don't know if I wrote on that one specific." (Tr. 276.) As I have already indicated, despite the importance attached to the timesheet by both Miller and Tester, the document was never placed into evidence.[16]

The absence of key documentary evidence was also a salient feature of the Company's defense to the General Counsel's allegation that Saldivar's layoff was discriminatorily motivated. Thus, Manning asserted that Saldivar was first transferred to the North Range project and then subject to a layoff due to the completion of that job. He explained, "So, we moved Saldivar over there [North Range] to help finish the job for a few days. And then at that—after that date, the whole crew was dismissed, all the bricklayers, and you can see that in our certified payrolls." (Tr. 191.) He also cited those certified payrolls regarding the situation at Central Campus. As he put it, "[t]he following two weeks later, Central Campus in our certified payrolls had 10 to 20 men laid off, you know, two weeks later. So, there was no sense bringing more men back for a week when we were ready to lay off anyway." (Tr. 191.) Given Manning's repeated references to the probative value of the certified payrolls in proving the legitimate nature of Saldivar's layoff, it is clearly remarkable to note that the payrolls were not placed into evidence.

In evaluating the impact of the Employer's failure to provide records that it admittedly created, maintained, or possessed, I have been guided by the Board's precedents. Those precedents all flow from a logical assumption noted long ago by the Supreme Court: "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. Silence then becomes evidence of the most convincing character." *Interstate Circuit v. United States,* 306 U.S. 208, 226 (1939). [Citations omitted.] In the context of missing testimony, the Board has observed that:

> [I]t is settled that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. [Citation and internal punctuation omitted.]

Daikichi Sushi, 335 NLRB 622 (2001), enf. 56 Fed. Appx. 516 (D.C. Cir. 2003).

In a decision adopted by the Board, another administrative law judge outlined the necessary elements that must be present to support the drawing of an adverse inference:

> These preconditions include (1) the party against whom the rule is invoked must have control of certain evidence; (2) the evidence in question must be relevant evidence which would probably be part of a case; (3) this party's interest would naturally be to produce the evidence; and (4) it did not offer a satisfactory explanation for failing to produce the evidence. [Internal quotation marks omitted.]

[16] It should be noted that, while Tester indicated that he was uncertain whether he had provided written comments on the timesheet relating to this particular matter, he was never asked to retrieve the document and determine if it contained any such notations.

Forsyth Electric Co., 332 NLRB 801, 818 (2000). In the present case, it is clear that the documents alluded to by the Company's officials would have been highly relevant and useful to the Employer's defense. Those documents were either created by the Employer or, in the case of the Corps of Engineer's inspection report, within the possession of the Employer. Finally, the Company made no attempt to explain or justify the failure to produce the very documents that its witnesses claimed would support its defense. In these circumstances, it is an inescapable conclusion that, "[t]he absence of corroboration of [the] testimony significantly impacts upon [its] credibility." *Made 4 Film, Inc.,* 337 NLRB 1152, 1159 (2002).

While the Board's adoption of the adverse inference principle is frequently utilized in the context of missing testimony, it has also been applied to missing documentary evidence. In an example with direct applicability to the situation in this case, an administrative law judge remarked on the effect to be given to the failure to produce the type of records that were similarly missing from this Employer's case:

> [A]t no time has Respondent ever produced pay records to support any of its claims as to who worked and where. Pay records would have reflected whether Hill and Johnson were paid as laborer foremen and on which jobsite they, Reynolds, and Toomey were employed. I infer from Respondent's failure to produce documents in its control and which were vital to prove its defense that the records did not support Respondent's position. [Footnote omitted.]

Galesburg Construction, 267 NLRB 551, 552 (1983). See also *Cooke's Crating,* 289 NLRB 1100, fn. 8 (1988) (adverse inference from failure to produce production records to support a defense that no more work existed), and *Teddi of California,* 338 NLRB 1032, fn. 8 (2003), (adverse inference from failure to produce a list of employees allegedly scheduled for layoff).

In sum, I must observe that the Board accords great probative value to documentary evidence of the type alluded to by the Company's witnesses. As it explained in *Granite Construction Co.,* 330 NLRB 205, 208 (1999), such documentary evidence "speaks for itself and cannot be minimized simply by concluding, as the judge did here, that the [Union's] witnesses subsequently testified honestly as to what they believed occurred." [Citations omitted.] Given the potential power of the timesheets, certified payrolls, construction diary, and Corps of Engineers' inspection report to have supported the Employer's defenses in this case, the unexplained failure to provide any of these documents leads inexorably to a conclusion that the paper trail would have undermined the Employer's case and that its case, consisting entirely of the uncorroborated assertions of its supervisors, is not worthy of credence.

2. The alleged violations of Section 8(a)(1)

The General Counsel alleges that statements by three supervisors during the period from January to March constituted unlawful intimidation of employees. The Board has recently summarized its analytical methodology for assessment of such claims:

> An employer violates Section 8(a)(1) by acts and statements reasonably tending to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The Board employs a totality of circumstances standard to distinguish between employer statements that violate Section 8(a)(1) by

> explicitly or implicitly threatening employees with loss of benefits or other negative consequences because of their union activities, and employer statements protected by Section 8(c). [Citations and certain internal punctuation omitted.]

Empire State Weeklies, Inc., 354 NLRB No. 91, slip op. at p. 3 (2009). In this connection, the Board has also observed that, "[t]he test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Double D Construction Group,* 339 NLRB 303 (2003). [Footnote omitted.]

I will now apply this standard to the three allegedly unlawful statements by supervisors. The first such allegation is that, "[i]n or around January 2009, Respondent, by Foreman Benedicto Torres at Ft. Lee Central Campus, told employees that Respondent did not want employees talking to the Union." (GC Exh. 1(e), par. 5.) Saldivar provided testimony regarding two exchanges with Torres at Central Campus that month. In the first of these, he reported that Torres convened a meeting of employees. During that meeting, Saldivar chose to ask Torres why "the company didn't want us to talk with the people from the Union." (Tr. 130.) Saldivar reported that Torres did not make any verbal response, but he "seemed to get really mad."[17] (Tr. 131.)

Saldivar went on to recount that he continued to speak with the organizers. Later in January, he reported a second exchange with Torres at Fort Lee. His complete testimony as to this conversation was as follows:

> GENERAL COUNSEL: [W]hat did Mr. Torres tell you about the Union?
>
> SALDIVAR: What Mr. Benedicto Torres told me about it, it was that if we were going to keep on talking with the people from the Union, he would probably fire us.
>
> GENERAL COUNSEL: Where? Where did this happen?
>
> SALDIVAR: In Fort Lee.
>
> GENERAL COUNSEL: When did he say this to you during the day?
>
> SALDIVAR: That was in January.

[17] I recognize that, on redirect examination, Saldivar amended his testimony to indicate that Torres did make a response to his question. After being led by counsel for the General Counsel's series of questions, he reported that Torres "said that it was no good for the company for us to be talking with the people from the Union." (Tr. 148.) I do not place evidentiary weight on this belated response. Even if one were to grant it some credence, it is too vague to constitute an unlawful threat. See *Baker Concrete Construction, Inc.,* 341 NLRB 598 (2004), and *Miller Towing Equipment, Inc.,* 342 NLRB 1074, 1075 (2004), cases in which the Board declined to find statutory violations on the basis of vague statements that are susceptible to varying interpretations. I note that a contention that conversations with the organizers were not good for the Company is different from a warning that such conversations would not be advantageous to the individual employees.

GENERAL COUNSEL: But during—if I could—I mean specifically during the day.

SALDIVAR: Oh, it was in the morning before I started to work.

(Tr. 131.)

I note that in his brief, counsel for the General Counsel contends that the events that occurred during Torres' meeting with employees constituted the misconduct alleged in this portion of the complaint. He did not address Saldivar's testimony regarding Torres' subsequent threat of discharge. This line of argument perplexes me for two reasons. Initially, I must conclude that the conduct of Torres during the meeting, as described by Saldivar, is too slender an evidentiary reed to support a finding of unlawful conduct by Torres. Earlier in this decision, I have explained that I credit the veracity of Saldivar's testimony and reject Torres' blanket assertion that he never engaged in the misconduct alleged since he was completely unaware of the Union's organizational campaign until many months later. Nevertheless, the fact remains that Saldivar's account merely demonstrates that on this specific occasion Torres made no overt response to Saldivar's question regarding the Company's position as to the Union's organizing effort. Saldivar's subjective assessment that Torres appeared to have been angered by the question cannot, in these particular circumstances, convert his silence into an act of intimidation or coercion.[18] If the General Counsel's allegation of misconduct by Torres at Fort Lee in January must be read as referring exclusively to this event, I would conclude that the General Counsel has failed to meet his burden of proving that Torres engaged in behavior that a reasonable person would find to be of such a nature that it would tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

By contrast, Saldivar provided clear and unequivocal testimony that Torres made a blatant threat of discharge. Consistent with the complaint allegations, Saldivar testified that this threat of discharge was made by Torres, in January, and at Fort Lee. There is no question that a supervisor's warning to an employee that the employee risks discharge if he persists in speaking to union representatives constitutes a violation of Section 8(a)(1). See *P.S.K. Supermarkets, Inc.,* 349 NLRB 34, 36 (2007) (directive to employee "not to be seen speaking with anyone from the Union" is unlawful), citing *Airport 2000 Concessions, LLC,* 346 NLRB 958, 959 (2006) (supervisor's instruction to employee not to speak to union organizer is unlawful). Here, I credit Saldivar's testimony that Torres made exactly this type of threat to him. I have already noted that I reject Torres' blanket denials of misconduct regarding the Union's organizing campaign. Furthermore, I note that Saldivar's description of Torres' expressed attitude as to this precise issue was strongly corroborated by Buezo's testimony that on an earlier occasion during the preceding autumn, Torres told him, "[t]hat anybody who had signed the card for the Union, he was going to fire him." (Tr. 92.) I conclude that Torres made the unlawful threat reported by Saldivar.

All of this brings me to the impact, if any, of the General Counsel's decision to argue in his brief that the misconduct encompassed by the allegation regarding Torres' threat of discharge involved an incident other than the one that constitutes the clear violation. Recently,

[18] As I have already indicated, the Board refuses to find a violation on the basis of vague statements. This principle would appear particularly applicable to a supervisor's conduct that did not include any speech at all, but merely left a viewer with a subjective impression that the supervisor was angry.

the Board addressed a similar problem in *Empire State Weeklies, Inc.,* 354 NLRB No. 91 (2009). In that case, the parties did not dispute that the employer uttered a threat against an employee due to his prounion attitude. The employee testified that the threat was made in September, but the employer's documentary evidence revealed that the employee was not working during that month and only returned to work on October 15. The employer argued that it was deprived of due process because it could not fully litigate the issue due to uncertainty as to the date of the offense.

The Board rejected the employer's due process claim, noting that, "the original and amended allegations involve the same individual, as well as the same conversation, and allege a violation of the same section of the Act." Id., slip op. at p. 2. The employer had the opportunity to cross-examine the employee and to present testimony from the supervisor. The Board concluded that the "minor discrepancies" and "date uncertainty" did not interfere with the employer's ability to litigate the issue and present its defense. Id., slip op. at p. 2.

By the same token, in this case the Employer had advance notice that the General Counsel contended that Torres uttered an unlawful threat at the Central Campus of Fort Lee during the month of January. Furthermore, the Employer was placed on notice that the threat consisted of a statement that "Respondent did not want employees talking to the Union." (GC Exh. 1(e), par. 5.) The witness who contended that Torres made the threat was present and subject to cross-examination. The supervisor who was alleged to have engaged in the misconduct was called as a witness by the Employer and denied ever having made such a statement. Regardless of the misdirected arguments presented in the General Counsel's post-trial brief,[19] I conclude that the evidence established a clear violation of the Act during the time period alleged in the complaint, by the person named in the complaint, and of the same character as the statement described in that complaint. For these reasons, I conclude that the General Counsel has met his burden of proving that the unlawful conduct alleged in par. 5 of the complaint did occur, and that there is no procedural unfairness in so finding.[20]

The second alleged violation of Section 8(a)(1) is asserted to have occurred on March 19 at the AIT jobsite. It is contended that Foreman Miller "coerced and intimidated employees by yelling at them in order to stop them from talking to Union organizers before working hours."

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[19] Counsel's for the General Counsel's arguments in his posttrial brief could not have misled or confused counsel for the Employer. Under the Board procedures, both sides are expected to file their briefs simultaneously. See Sec. 102.42 of the Board's Rules and Regulations. I directed that this customary procedure be followed in this case. As it happened, the Employer's brief was actually filed several days before the General Counsel's brief.

[20] At first blush, it would seem that the resolution of this problem would fall within the Board's longstanding "closely related" doctrine which authorizes a judge to find a violation, "even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales,* 296 NLRB 333, 334 (1989), enf. 920 F.2d 130 (2d Cir. 1990). In *Pergament*, for instance, the Board adopted the finding of a violation of Section 8(a)(4) even though no such violation had been alleged in the complaint. I conclude that the "closely related" doctrine does not apply to the situation in this case because this complaint did allege a violation within the same time-frame, at the same location, involving the same persons, consisting of the same misconduct, and falling within the identical statutory prohibition as that which I am adjudicating. However, I do consider *Pergament's* requirement that the matter has been fully litigated to be relevant here. Torres' statement to Saldivar containing the threat of discharge was so litigated. Every witness who could have testified about it did so. No stone was left unturned.

(GC Exh. 1(e), par. 6.) There was persuasive evidence establishing that this event took place as described. Painter, Alvarez, and Buezo all provided clear and consistent testimony about it. They reported that the Union's organizers were in the parking lot speaking with employees. Approximately 10 to 15 minutes prior to the start of the workday, their conversation was interrupted by loud yelling from Miller. Miller twice addressed Buezo, shouting, "What the fuck are you doing?" (Tr. 93 and 160.) Alvarez testified that this angry query was accompanied by Miller "pointing at him and toward us. And then he just bowed the head, kicked the dirt, and went onto the job." (Tr. 161.)

In his own testimony, Miller denied this event in every conceivable manner. He denied ever yelling at any employee in the parking lot at AIT. He denied ever yelling at Buezo. He denied ever having any conversation with Buezo regarding the Union. Finally, he denied any knowledge of the organizing campaign. As he put it, "I didn't even know there was any union there." (Tr. 230.) In evaluating these sweeping denials, I am mindful of the Board's frequent admonition that, in addition to demeanor evidence, the trial judge should consider a variety of other powerful analytical tools. Thus, the Board has observed that, beyond evaluation of demeanor, "it is abundantly clear that the ultimate choice between conflicting testimony also rests on the weight of the evidence, established or admitted facts, inherent probabilities, [and] reasonable inferences." *Northridge Knitting Mills,* 223 NLRB 230, 235 (1976). These factors lead me to reject Miller's denials.

In order to accept Miller's account, I would have to conclude that he remained entirely ignorant of the Union's organizing campaign. The weight of the evidence convincingly shows that the campaign consisted largely of a pattern of frequent visits to the parking lots for each of the Company's jobsites. Numerous witnesses confirmed the occurrence of these visits and the open and obvious manner in which they were conducted. It is inherently improbable that Miller would remain unaware of this constant pattern of activity taking place immediately outside his workplace and involving a matter of keen interest to his employees and himself. Indeed, while Miller's absolute insistence on his complete ignorance was echoed by other supervisors, under cross-examination, Czeizinger eventually broke ranks and conceded that he had observed union representatives in the parking lot. Furthermore, in his letter to the employees regarding the representation election, Manning acknowledged that the Union's organizing effort was a subject of discussion through the Company's "grapevine." (GC Exh. 2.) It strains credulity to accept Miller's claim that he somehow remained in total, and perhaps blissful, ignorance of the controversy that was swirling around him. For these reasons, I find that Miller did engage in unlawful coercion and intimidation by cursing and yelling at Buezo in the parking lot due to Buezo's participation in conversation with the union representatives.

The General Counsel's final allegation of misconduct prohibited by Section 8(a)(1) was the contention that, on April 24, Czeizinger told Buezo that "he had done something wrong by talking with union agents and was being terminated for that reason." (GC Exh. 1(e), par. 7.) In my view, counsel for the Employer has accurately summarized the state of the record as to this allegation:

> No evidence was introduced by the General Counsel in support of the claim that Czeizinger told an employee he had done something wrong by talking with Union agents and was being terminated for that reason. The only testimony in the case regarding Czeizinger and the termination of an employee's employment related to the discharge of Buezo on April 24, 2009. Buezo offered no testimony in support of this claim and stated only that Czeizinger had told him that his work was wrong. Czeizinger's testimony supported Buezo

on this point. Accordingly, this claim must be dismissed.

(R. Br., at p. 13.) [Citation to the record omitted.]

I have closely examined the testimony on this issue and conclude that counsel's summarization of it is entirely accurate. The uncontroverted evidence established that Czeizinger told Buezo that he was being discharged for poor workmanship, not for any union activities. Accordingly, I will recommend dismissal of this allegation.

3. The allegedly discriminatory layoff of Saldivar

It is undisputed that the Company terminated Saldivar's employment on April 24. The General Counsel contends that his termination was unlawfully motivated by an intent to discriminate against him due to his union sympathies and activities in violation of Section 8(a)(3). In response, the Employer asserts that Saldivar was terminated for genuine and legitimate business reasons consisting of a layoff resulting from the lack of available work for him to perform, coupled with a history of poor workmanship.

In these circumstances, it is necessary to employ the Board's analytical framework for the evaluation of cases involving disputed motivation. That standard was devised by the Board in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399—403 (1983). A comprehensive exposition of that test was provided by the Board in *American Gardens Management Co.,* 338 NLRB 644, 645 (2002):

> *Wright Line* is premised on the legal principle that an employer's unlawful motivation must be established as a precondition to finding an 8(a)(3) violation. In *Wright Line*, the Board set forth the causation test it would henceforth employ in all cases alleging violations of Section 8(a)(3). The Board stated that it would, first, require the General Counsel to make an initial showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. If the General Counsel makes that showing, the burden would then shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The ultimate burden remains, however, with the General Counsel.
>
> To establish his initial burden under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action.
>
> If, after considering all of the relevant evidence, the General Counsel has sustained his burden of proving each of these four elements by a preponderance of the evidence, such proof warrants at least an inference that the employee's protected conduct was a motivating factor in the adverse employment action and creates a rebuttable presumption that a

> violation of the Act has occurred. Under *Wright Line* the burden then shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. [Internal quotation marks, citations, footnotes, and language not relevant to this case have been omitted.]

See also the Board's discussion of this quoted language and Member Schaumber's additional commentary in *Frye Electric, Inc.,* 352 NLRB 345, fn. 2 (2008).

At the first steps in the process, I readily find that Saldivar engaged in protected union activities and that his employer was aware of his conduct and sympathies. The evidence demonstrated that, during January, Saldivar was a willing participant in the conversations initiated by the union organizers in the parking lot at his worksite. He raised the topic of the Union with Torres at an employee meeting and subsequently received a warning from Torres that he risked discharge if he persisted in participating in those discussions with the Union's agents.

In March, Saldivar elected to sign an authorization card for the Union. Immediately upon his doing so, Alvarez shook his hand. All of this was observed by Torres from his vantage point in the Company's van that was parked a short distance away. As shown by these incidents, the Company was plainly aware that Saldivar was an active supporter of the Union to such a degree that he was even willing to confront his supervisor on this issue at a meeting of employees.

At the next analytical stage, I must determine whether Saldivar was subjected to an adverse action. The Board does not hesitate to conclude that an unlawfully motivated layoff constitutes such an adverse action. *Kieft Brothers,* 355 NLRB No. 19 (2010), and *McGaw of Puerto Rico,* 322 NLRB 438 (1996), enf. 135 F.3d 1 (1st Cir. 1997). Of course, this conclusion is rather obvious, given that an employer's decision to impose a layoff deprives the affected worker of the means of earning a living. As another administrative law judge once put it, "loss of employment [is] frequently referred to as the 'capital punishment' of the workplace." *Reno Hilton,* 320 NLRB 197, 209 (1995).

In order to meet his burden, the General Counsel must next prove that the Employer's decision to lay off Saldivar was substantially motivated by unlawful animus against his union activities and sympathies. In evaluating whether the adverse action taken against Saldivar was so motivated, it is necessary to undertake a comprehensive and wide ranging examination of the context surrounding the decision to lay him off. The Board has long recognized that direct evidence of unlawful animus may be difficult to obtain. As a result, "[i]t is well established that a discriminatory motive may be inferred from circumstantial evidence and the record as a whole, and that direct evidence of union animus is not required."[21] *Tubular Corp. of America,* 337 NLRB 99 (2001). [Citations omitted.] In *Fresh Organics,* 350 NLRB 309, fn. 17 (2007), the Board enumerated some of the factors that should be evaluated:

> Unlawful motive may be demonstrated not only by direct evidence but by circumstantial evidence, such as timing, disparate or inconsistent treatment, expressed hostility

[21] Of course, there is direct evidence present in this case. Torres predicted that Saldivar's ongoing union activities would probably lead the Employer to terminate his employment. Such a prediction, coupled with the fact that it came to fruition, is powerful direct evidence of unlawful discriminatory animus directed against Saldivar.

> toward the protected activity, departure from past practice, and shifting or pretextual reasons being offered for the action. [Citation omitted.]

Naturally, the starting point for an assessment of the Employer's state of mind must be the findings I have already made regarding the Employer's behavior during the organizing campaign. I have concluded that the General Counsel has proven that Torres and Miller engaged in activities designed to restrain, coerce, and intimidate employees in response to that effort. These unfair labor practices constitute clear and persuasive evidence of management's willingness to violate the Act in order to frustrate that campaign. As such, they represent powerful evidence of unlawful animus. See, *St. Margaret Mercy Healthcare Centers,* 350 NLRB 203, 204 (2007), enf. 519 F.3d 373 (7th Cir. 2008) (unfair labor practices committed during organizing campaign constitute evidence of animus for purposes of *Wright Line* analysis).

The Employer's unfair labor practices go beyond the demonstration of a generalized attitude of animus against union supporters. It will be recalled that Saldivar was the direct target of Torres' threat to discharge employees who talked with the Union's organizers. Thus, the specific nature of this unfair labor practice directed at Saldivar is highly probative of a particular intent to engage in the precise form of discriminatory conduct alleged to have occurred here. One cannot ignore the fact that Torres' direct prediction of Saldivar's termination was ultimately fulfilled by the decision to lay him off. The Board finds that adverse actions taken against the individuals who had previously been the target of other employer misconduct raise a powerful inference of unlawful motivation. See *Waste Management of Arizona,* 345 NLRB 1339, 1341 (2005) (inference of animus appropriate when discharged employee had been "the specific target" of other unfair labor practices).

Further inferential evidence of unlawful antiunion animus may be found in the peculiar statements made by Torres in connection with Saldivar's layoff. Saldivar provided uncontroverted and credible testimony that he phoned Torres immediately after learning from Marcos that he was being laid off. Torres advised Saldivar that "in this company we don't have any more work for you." (Tr. 136.) Indeed, Torres went so far as to add, "I'm going to talk to the other foremen in the company, and I'm going to tell them not to give you any more work." (Tr. 136.) These are certainly striking and unusual comments to make to an employee who is being laid off, as opposed to someone being discharged for disciplinary reasons. In fact, Torres' statements run directly contrary to the Company's existing policies. Manning testified that:

> [I]f we have another project to go to, you know, because we do more than one, if that job needs more men, we may move th[ose] men instead of laying them off temporarily until we get another job. We bring them over to that job if we need the crew expanded over there.

(Tr. 183.) Beyond articulating the Company's policy to make an effort to avoid layoffs by making transfers, Manning also explained that the Company's practice is to bring back laid off employees as conditions permit, "if they've done a, you know, fair job." (Tr. 199.) It is clear that Torres' statements to Saldivar expressed an unexplained and highly suspicious plan to depart from established company policy and demonstrated a clear intent to treat Saldivar in a disparate and discriminatory manner.[22]

[22] It is worthwhile to note that Torres, himself, confirmed Manning's testimony that the Company used transfers as a means to avoid laying off employees. See Tr. 297.

Finally, I have applied the Board's analytical approach of assessing the Employer's stated rationale for taking adverse action against an employee in order to shed additional light on the issue of animus. Thus, the Board has observed that, "it is well settled that, where an employer's stated motive is found to be false, an inference may be drawn that the true motive is an unlawful one that the employer seeks to conceal." *Key Food,* 336 NLRB 111, 114 (2001).[23] For reasons that I am about to discuss in detail, I have concluded that the Employer's stated rationale for the termination of Saldivar's employment is not worthy of belief. As a result, this factor constitutes further evidence that unlawful animus was the actual motivation for its actions.

Having determined that Saldivar engaged in protected activity, that his employer was aware of his involvement with the Union and took adverse action against him, and that unlawful discriminatory animus formed a substantial and material component of the Employer's motivation, the burden now shifts to the Employer to demonstrate that it would have taken such adverse action regardless of Saldivar's involvement with the Union. In his testimony, Manning provided a succinct statement of the Employer's asserted rationale that Saldivar "was laid off due to lack of work because the job was winding down." (Tr. 38.) Of course, this formulation only provides a portion of the explanation for a layoff. Apart from explaining why a layoff was imposed, the Employer must also offer a nondiscriminatory rationale as to why Saldivar was the person selected for that layoff. Torres was the only management official to offer such an explanation, testifying that he had Saldivar in mind for lay off "because of his poor workmanship." (Tr. 293.)

A review of the record demonstrates that neither prong of the Employer's explanation carries any significant degree of evidentiary support. Turning first to the supposed necessity of imposing a layoff, one fact is immediately striking. The entire layoff of staff on April 24 consisted of Saldivar. Yet, it so happens that there was an immediate opening for a bricklayer at Fort Lee as of that same date. It will be recalled that the Employer contends that it discharged Buezo for cause on the very same day. The Company has never attempted to explain why Saldivar was not transferred to fill Buezo's newly vacant slot despite the existing policy to make such transfers in order to avoid the necessity of laying off its people.

Apart from this obvious question, I note that an employer defending a termination on the basis of the need to downsize its staff may reasonably be expected to produce evidence regarding the level of staffing in the period immediately preceding and following the date of the layoff.[24] Counsel for the Employer implicitly recognized as much in his opening statement,

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[23] The Supreme Court has strongly endorsed this methodology in the context of a statute prohibiting age discrimination. As the Court stated, "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive . . . . [O]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision." *Reeves v. Sanderson Plumbing Products,* 530 U.S. 133, 147 (2000). [Citations omitted.]

[24] Indeed, in a decision adopted by the Board, one administrative law judge put it very strongly, observing that, "having advanced an economic defense in explanation of a layoff accomplished in the suspicious circumstances here extant, it was incumbent upon Respondent in order to support his defense to proffer more than oral testimony. None was offered. Accordingly, in my view, Respondent failed to adduce convincing evidence that economic considerations necessitated [the] layoff." *Reeves Rubber, Inc.,* 252 NLRB 134, 143 (1980).

Continued

asserting that, "[t]he company went from 25 bricklayers [at AIT] down to 15 or 16." (Tr. 178.) No evidence was introduced to prove this assertion. Although the Company's supervisors testified that the Company maintained certified payroll records, no documentary evidence was submitted. Indeed, the only such evidence regarding the level of staffing consisted of documents introduced by the General Counsel that showed that the Employer hired 5 bricklayers in April, three of whom were hired in the two weeks immediately preceding Saldivar's layoff. (GC Exh. 6.) The clear significance of this evidence was underscored during counsel for the General Counsel's cross-examination of Torres:

> GENERAL COUNSEL: So is it true that the company hired employees, bricklayers, in April as you laid off Mr. Saldivar?
>
> TORRES: Yes.

(Tr. 301.) Thus, the Company has failed to meet its burden of demonstrating a legitimate economic reason for its decision to lay off a bricklayer on April 24.

Beyond this, the Company also failed to meet its burden of showing that it had a legitimate and nondiscriminatory reason to select Saldivar as the individual to be laid off. The only evidence it offered in support of such a claim was Torres' bald assertion that he intended to lay off Saldivar for "poor workmanship." (Tr. 293.) At no point throughout the trial did Torres or any other supervisor explain the nature of this so-called poor workmanship. Furthermore, the record demonstrates that the Employer did not have a negative opinion of Saldivar's performance. He was first employed by the Company in February 2007. When the first project he worked on was completed, he was employed on another one. After that, he was hired a third time to work at Fort Lee. Saldivar provided uncontroverted testimony that he was never subjected to discipline, nor had he ever received any complaints about his performance. Thus, the evidence shows that he was a satisfactory employee with an unblemished history whose past job performance was such that he was twice reemployed by the Company. The record is barren of any evidence of misconduct or poor performance.

The Employer has failed to show that it had a legitimate reason to conduct a one-person layoff on April 24. Similarly, it has failed to demonstrate that it had a legitimate and nondiscriminatory reason to select Saldivar as the person to lay off on that date. As a result, I find that the General Counsel has met his burden of proving that the Employer terminated Saldivar's employment because of his participation in protected union activities in violation of Section 8(a)(3) and (1) of the Act.

4. The allegedly discriminatory termination of Buezo

On the same day it laid off Saldivar, the Employer chose to terminate Buezo. The General Counsel alleges that this decision was the product of unlawful animus against Buezo arising from his protected union activities and sympathies in violation of Section 8(a)(3) of the

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While I think this should not be read as a categorical rule, the Board, in *Davey Roofing, Inc.,* 341 NLRB 222, 223 (2004), did cite *Reeves Rubber* while noting that, in the case before it, "Respondent failed to offer corroborating documentation of a slowdown in work . . . . The absence of such documentation is significant here, where the only evidence proffered in support of the business slowdown is inconsistent and uncorroborated oral testimony." As a result, the Board found that the employer had failed to prove its *Wright Line* defense that it would have laid off employees due to economic conditions and regardless of their union activities.

Act. The Company contends that it fired Buezo for severe deficiencies in the performance of his duties as a bricklayer. Because resolution of this controversy requires an analysis of the Employer's motivation, it is again necessary to engage in the evaluation mandated by *Wright Line.*

At the initial step, it is clear that Buezo participated in the same forms of union activity as Saldivar. He testified that he first began meeting with the Union's organizers in 2008. Organizer Alvarez confirmed this, reporting that as of the winter of 2009, there was a regular group of employees who would meet with him in the parking lot. Buezo was a member of this group. Buezo's involvement with the Union culminated on March 26, when he signed an authorization card in the presence of all three of the organizers.

The evidence also revealed that Buezo's union activities came to the attention of the Company's supervisors and provoked a hostile response toward him. During the fall of 2008, Buezo had an encounter with Foreman Torres in the parking lot. Buezo provided credible testimony that Torres warned him "[t]hat anybody who had signed the card for the Union, he was going to fire him." (Tr. 92.)

I have also credited the consistent testimony of multiple witnesses who reported that Buezo's participation in protected activity also evoked a strong response from Foreman Miller. This event occurred on March 19, approximately 10 to 15 minutes prior to the start of the workday. Buezo was engaged in conversation with the three union organizers in the parking lot. Observing this activity, Miller yelled at Buezo, repeatedly shouting the query, "What the fuck are you doing?" (Tr. 93, 160.) As he cursed at Buezo, he pointed at the group of men, bowed his head, and "kicked the dirt." (Tr. 161.)

Based on this evidence, I find that Buezo engaged in protected union activity and that his involvement with the Union was known to his supervisors. It is undisputed that the Employer chose to fire Buezo on April 24. Obviously, this constituted an adverse action taken against him. Thus, it becomes necessary to determine whether unlawful antiunion animus formed a substantial part of the motivation underlying the decision to discharge Buezo. I conclude that it did form a decisive part of the Employer's rationale.

As with Saldivar, my starting point must be a recognition that I have already determined that the Employer committed unfair labor practices in response to the Union's organizing effort. Such conduct is evidence of unlawful motivation. Beyond that, in another similarity with Saldivar's situation, the evidence demonstrated that one of those unfair labor practices was specifically directed against Buezo. The fact that Foreman Miller was prepared to unlawfully coerce, restrain, and intimidate Buezo from engaging in conversations with the Union's organizers before his workday began is direct and persuasive evidence of animus, both against the Union's supporters generally and Buezo specifically.

Apart from Miller's unlawful conduct, there is additional evidence of direct animus against Buezo. That evidence consists of Torres' warning to Buezo that persons who signed authorization cards for the Union would be fired. Less than a month after Buezo chose to sign such a card, Torres' prediction was fulfilled. The Board has clearly described the logical implication of such a sequence of events:

> Threats to eliminate the employees' source of livelihood have a devastating and lingering effect on employees. An inference may be drawn from the animus behind such threats, which the discharge would gratify, that the animus was the true

reason for the discharge. [Citations omitted.]

Vico Products Co., 336 NLRB 583, fn. 16 (2001), enf. 333 F.3d 198 (D.C. Cir. 2003). In reaching this conclusion regarding Torres' threat, I am aware that the General Counsel did not allege that threat as a separate unfair labor practice.[25] As the Board has explained, "[i]t is well settled that conduct that exhibits animus but that is not independently alleged or found to violate the Act may be used to shed light on the motive for other conduct that is alleged to be unlawful." *Meritor Automotive, Inc.,* 328 NLRB 813 (1999), citing *American Packaging Corp.,* 311 NLRB 482 (1993). In this case, Torres' prescient warning to Buezo provides powerful illumination into the Employer's motivation in carrying out the precise threat uttered by its supervisor.

Another potent analytical factor supporting a conclusion that animus was present to a decisive degree is the decision to lay off Saldivar on the same day that Buezo was terminated. The Board has held that "discriminatory discharge of one worker [is] a factor to consider in weighing whether the contemporaneous discharge of a second coworker, who engaged at the same time in the same prounion activity, was discriminatory." *Extreme Building Services Corp.,* 349 NLRB 914, 916 (2007), citing *Howard's Sheet Metal, Inc.,* 333 NLRB 361 (2001). In this case, Saldivar and Buezo engaged in the same sorts of prounion activity and were given very similar warnings that this would lead to their termination. The fact that they were terminated at the same time is strong evidence of unlawful animus against them both.[26]

Because I have concluded that Buezo engaged in protected union activity that had come to the attention of his supervisors and that unlawful animus formed a dominant component of their decision to take adverse action against him, the burden now shifts to the Employer to demonstrate that it would have discharged Buezo regardless of his involvement with the Union.

The Employer's supervisors testified that Buezo's discharge represented the culmination of an ongoing effort to cope with Buezo's poor work performance. According to the Employer's witnesses, this effort included an incident in August 2008, while Buezo was working at Central Campus under the supervision of Torres. Torres reported that Buezo had been subject to a series of prior warnings for poor workmanship. In August he "ran a wall out of plumb." (Tr. 288.) Torres reported that, "I told him that I had given him several warnings trying to help him out,[27] but that particular one was costing our company too much money and I had to let him go. So I fired him." (Tr. 288—289.) Torres conceded that he did not report the firing of Buezo to anyone else at Manning, nor did he put anything about it in writing.

Buezo testified that Torres did discipline him on this occasion, telling him that, "I have to go on suspension." (Tr. 109.) Buezo also contended that the suspension was unjustified because Torres' wrongfully assumed that the defect in the wall was Buezo's fault. It was

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[25] I note that the Union filed its first charge in this case in June 2009. Buezo testified that Torres uttered his threat of discharge during the fall of 2008. Given the statute of limitations set forth in Sec. 10(b) of the Act, it is not surprising that the complaint did not include a claim that Torres' threat violated Sec. 8(a)(1).

[26] In drawing this conclusion, I cannot help but note that the Employer simultaneously dismissed an open supporter of the Union from each of the two large projects it was performing at Fort Lee. Furthermore, these dismissals took place as the organizing effort was gathering steam. It will be recalled that the Union filed its representation petition less than 3 weeks later. While there is no overt evidence that these events represented a coordinated strategy to thwart the organizing campaign, the circumstances are strongly suggestive of this.

[27] Torres testified that he made no record of any of these warnings.

Buezo's position that the defect had been produced by another employee named Isidro. Whatever the accuracy of these differing claims, it is undisputed that Buezo returned to employment with the Company very shortly thereafter. He was hired for the AIT project by Foreman Miller.

Once again, the circumstances under which Buezo was hired by Miller are in dispute. Miller contended that Buezo simply appeared at AIT and told him that "Benny [Torres] sent him over to our job to work for us." (Tr. 216.) Miller says that he accepted Buezo's account and put him to work. In contrast, Buezo testified that he provided Miller with a complete explanation of the circumstances that led to his dispute with Torres. In particular, he reported that he told Miller that Torres "had laid me off because of other people's mistakes." (Tr. 112.) Upon hearing Buezo's explanations, Miller offered him employment at AIT.

In resolving this dispute, I am struck by the implausibility of the Company's position. Torres asserts that he fired Buezo but admits that he never told anyone, nor did he put anything in writing. As CEO Manning conceded, although Buezo had allegedly been fired from Central for bad workmanship, "there's no documentation." (Tr. 53.) This is particularly troubling because Miller testified that it was necessary for a supervisor to notify the payroll department of the reasons for an employee's termination "for purposes of unemployment compensation." (Tr. 246.) I certainly credit Miller's testimony as to this point because it is entirely logical and consistent with the needs of a substantial business enterprise that employs scores of individuals on a variety of projects. It is evident that documentation establishing the circumstances of an employee's termination is essential to the administration of the Company's participation in the unemployment compensation system.[28] The utter failure of the Company to create, maintain, or produce a single written record of this alleged termination of Buezo from the Central Campus is cause to view the Company's claims with considerable skepticism.

While the Company's position is entirely unsupported, Buezo's account is corroborated to some degree by Miller's testimony under cross-examination regarding his decision to hire Buezo at AIT. Miller testified as follows regarding the circumstances under which Buezo was hired for the AIT project:

> GENERAL COUNSEL: He had, in fact, he had worked for you on several occasions?
>
> MILLER: Yeah.
>
> GENERAL COUNSEL: So you knew his work?
>
> MILLER: Yeah.
>
> GENERAL COUNSEL: And you hired him, you agreed to hire him when he came to AIT; isn't that correct?

[28] The Board recognizes that a key issue in unemployment compensation proceedings concerns the evaluation of the precise circumstances involved in the termination of an employee. Indeed, it has long held that such administrative determinations constitute admissible evidence in Board proceedings. See *Baptist Hospital*, 328 NLRB 628, 635 (1999), affd. 244 F.3d 134 (5th Cir. 2000), and *Duquesne Electric & Maintenance Co.,* 212 NLRB 142, fn. 1 (1974), enf. 518 F.2d 701 (3d Cir. 1975).

MILLER: Yeah.

JUDGE: You are the person who actually hired him?

MILLER: Yeah.

GENERAL COUNSEL: Okay. And the reason you agreed to hire him because you knew he could do the job; isn't that right?

MILLER: I knew most of his skills, yeah.

GENERAL COUNSEL: Okay. You felt he was capable of doing the job?

MILLER: Yeah.

(Tr. 231.)

In my view, this testimony supports Buezo's contention that he explained the situation to Miller and Miller made an informed decision to offer him employment at AIT. At a minimum, Miller's testimony establishes that he did not blindly acquiesce in Buezo's supposed story about an unsolicited transfer to AIT as indicated in Torres' account. Rather, Miller's admission that he engaged in a decision making process when hiring Buezo tends to support Buezo's claim that he explained the situation regarding Isidro and Torres to Miller and Miller agreed to employ him at AIT based on his prior successful performance when working for him.[29]

After being brought onto the AIT project by Miller in the summer of 2008, Buezo continued to work there until his termination in late April of the following year. He testified that he never received any complaints, either verbal or written, regarding his job performance. There is no question that the Company did not provide any documentation of any history of problems with that performance. Despite this, Buezo testified that when he reported to work on April 24, Czeizinger told him to "pick up my tools and leave." (Tr. 102.) When Buezo asked for the reason he was being fired, Czeizinger told him that he had done some work that "was not good." (Tr. 102.) This was reiterated by Miller. Buezo next went to Tester to try to get an explanation for his abrupt termination from the highest authority on the jobsite. Both Buezo and Tester described Tester's response by demonstrating a dismissive gesture.

Tester's curt refusal to discuss the rationale for Buezo's termination with him is evidence of unlawful motivation. A supervisor's unwillingness to explain an adverse action raises an inference that such an explanation would be difficult to formulate or that the supervisor would prefer to remain silent rather than to dissemble. See the Board's discussion of this concept in *Corrections Corp. of America,* 354 NLRB No. 105 (2009), slip op. at 4, citing *Yellow Ambulance Service,* 342 NLRB 804, 805 (2004).

Although unable or unwilling to articulate a detailed rationale for Buezo's termination at the time, the Employer's witnesses attempted to provide one during the course of the trial. In this regard, three of the Company's supervisors provided testimony. Miller reported that Buezo was involved in three incidents of deficient work performance at AIT. He indicated that the first

[29] In his testimony, Miller confirmed that he had supervised Buezo on other projects for Manning prior to deciding to employ him at AIT.

took place sometime in 2009 at a single story battalion structure. Buezo worked on a stone overhang and "messed it up" such that it had to be torn down and repaired. (Tr. 219.) Miller was called to the scene by Tester to serve as a translator. On Tester's instruction, he told Buezo that Tester "didn't want any more mistakes and that he would give him another chance." (Tr. 222.)

Miller indicated that the second incident occurred "a couple months after" the first event. (Tr. 225.) This involved improper work on the bond at the main entry of Building 1. Miller reported that the defect had escaped notice by Manning's staff. He testified that the Corps of Engineers "had come after the scaffolding and everything had been tore out and everything to let us know that it was unacceptable, to have it fixed." (Tr. 224.) Miller told Buezo that this was "a major mistake," but that he would "give him one more chance." (Tr. 224.) Miller also testified that Tester imposed a suspension on Buezo for this error. The suspension was for 2 or 3 days.

Finally, Miller testified that, approximately 3 months later, on April 24, Buezo made his third and final construction mistake. This involved a "major belly in the wall" that required that the wall be torn down and rebuilt. In consequence, Miller reported that, "I fired him." (Tr. 226.)

There are several crucial problems with Miller's account. In the first place, his reports of severe and recurrent problems with the quality of Buezo's work are strikingly inconsistent with his own prior history with Buezo. Buezo was first hired by Manning in 2007. He was given employment at four separate projects, a school building, jail, and the two Fort Lee jobs. Miller had been his supervisor on several occasions, including at the school worksite. That job was the one that immediately preceded the AIT project. Despite this extensive history with Buezo, Miller did not report any difficulties with his prior work performance. I infer that he was satisfied with Buezo's job performance given his testimony that he readily agreed to take Buezo onto his crew at AIT based on his assessment of Buezo's "skills." (Tr. 231.)

At trial, I was struck by Miller's evident discomfort with efforts to get him to disparage Buezo's performance. Thus, when counsel for the Employer attempted to raise this topic, Miller's evasive answer clearly demonstrated his conflicted feelings:

> COUNSEL: How would you assess his skills as a bricklayer compared to the average bricklayer that worked at Manning that you supervised?
>
> MILLER: I don't know. I mean you have got guys that are better than others all around. You have got guys that can lay block better than—I mean you have got guys that can lay brick. So, I mean, he wasn't a topnotch, but you know—

(Tr. 214—215.) I find this to be a revealing bit of testimony regarding Miller's actual opinion of Buezo's job performance. One would certainly expect the supervisor who fired an employee for grossly deficient performance to be able to articulate a coherent rationale. Miller's unwillingness to do so is consistent with his record of employing Buezo on the Company's projects, including his willingness to bring him on board for the AIT project despite his prior problem with Torres at Central Campus.

Beyond the inconsistency between Miller's reporting of repeated performance problems and his notable reluctance to denigrate Buezo's job skills, I am struck by the total absence of independent evidence to corroborate his account of a history of disciplinary actions. For

example, regarding the second incident at Building 1, Miller testified that he was notified by the Corps of Engineers. Despite this, no documentary evidence, such as an inspection report, was admitted. In addition, no testimony was adduced from any inspector with the Corps. Furthermore, while Miller asserted that Buezo was subjected to a disciplinary suspension for this incident, no certified payroll records or other time and attendance reports were offered to substantiate this claim. Finally, Miller testified that he never prepared any written documentation regarding Buezo's mistakes. For all of these reasons, I reject Miller's account as undocumented, uncorroborated by independent evidence, and unreliable.

Tester also provided an account of Buezo's alleged mistakes at AIT. He described an initial incident in January when he admonished Buezo that his quality "needed to be a lot better," but "I'd give him an opportunity to do that." (Tr. 269.) Approximately a month later, there was a second problem at the main entry to Building 1. Tester stressed that this condition "was brought to our attention by the Army Corps." (Tr. 270.) Specifically, he testified that, "I was notified on paper by the Corps of Engineers." (Tr. 275.) As a result, Tester testified that he imposed a suspension on Buezo, observing that "you can probably reflect on time sheets, and that would probably show up there." (Tr. 275—276.) Indeed, counsel for the General Counsel pursued this point, asking Tester if he would have written anything about the suspension on the time-records. Tester replied, "[u]sually on the commentary or the—now there's a common area. If I lay off or suspend or fire, I write on there. Now, I don't know if I wrote on that one specific." (Tr. 276.) In sharp contrast to Miller's testimony that Buezo was suspended for a couple of days, Tester reported that the suspension lasted "seven or eight working days." (Tr. 272.) Of course, absent payroll records, it is impossible to determine whether the suspension actually happened and, if so, how long it lasted.

Finally, Tester reported that on April 24, his foremen informed him that Buezo had made another error. As he put it, "obviously, it was time for him to be terminated." (Tr. 272.) He instructed Czeizinger to tell Buezo to report to him. When Buezo attempted to do so, Tester waved him away. Buezo refused to be deflected, instead "he was begging and begging" to retain his job. (Tr. 273.) Tester indicated that he told Buezo that, "[t]his is the third time. I can't put up with it any further." (Tr. 273.)

As with Miller's account, one cannot ignore the striking lack of documentation. Indeed, in Tester's case the witness, himself, drew attention to this feature of the record. In case a factfinder were to miss the significance of documentary corroboration, Tester volunteered that it could be found in the Corps of Engineers' report and his own notations on Buezo's timesheet. Furthermore, Tester also reported that he maintains a "construction diary." (Tr. 284.) He asserted that the diary would contain a notation if he terminated an employee. He was unable to state whether the diary reflected his suspension of Buezo and testified that he had not brought it to the hearing with him. Thus, even the lay witness readily recognized the probative value of documentary corroboration of his assertions. No such evidence was ever produced. I conclude that Tester's unsupported claims are not entitled to credence.

The remaining account of Buezo's discharge was furnished by Czeizinger. He advised that he discovered Buezo's deficient work and told him to report to Tester. He acknowledged that he never told Buezo that he was being terminated. As with his colleagues, he also confirmed that he had never given Buezo any written warnings or suspensions. He also indicated that he had never made any notations in his log regarding Buezo. As he attempted to explain, "we don't usually have any paperwork there." (Tr. 265.) Czeizinger's testimony adds nothing of substance.

The Employer's evidence consists entirely of the bald assertions of three supervisors,

each of whom claim that they were entirely unaware of Buezo's protected activities and that they could not point to a single item of evidence to support their accounts despite the probable existence of some documents that would address the matter directly. Upon comparing their partisan and unsupported description with the credible evidence of animus against Buezo arising from his relationship with the Union, I conclude that his termination was not based on any supposed deficiency in his job performance. To the contrary, I find that his termination, like that of Saldivar, was directly motivated by unlawful and discriminatory purposes. As a result, it violated Section 8(a)(3) and (1) of the Act.

Conclusions of law

1. In January 2009, the Employer, through Foreman Torres, restrained, coerced, and intimidated an employee in the exercise of his Section 7 rights by warning him that its employees would probably be fired for speaking with representatives of the Union. This conduct violated Section 8(a)(1) of the Act.

2. On March 19, 2009, the Employer, through Foreman Miller, restrained, coerced, and intimidated employees in the exercise of their Section 7 rights by yelling and cursing at them because they were speaking with representatives of the Union. This conduct violated Section 8(a)(1) of the Act.

3. On April 24, 2009, the Employer engaged in unlawful discrimination against its employees, Jaime Saldivar and Fredy Buezo, by terminating their employment because of their union sympathies and activities. This conduct violated Section 8(a)(3) and (1) of the Act.

4. The Employer did not violate the Act in the other manner alleged in the complaint.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including the posting of an appropriate notice. A central component of the required relief must be addressed toward the discharged employees. The Respondent having discriminatorily discharged Jaime Saldivar and Fredy Buezo, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[30]

In the complaint, the General Counsel seeks extraordinary remedies pertaining to the notice, consisting of a reading of the notice in the Spanish language by a representative of the

[30] As has become his rote practice in unfair labor practice cases, the General Counsel asks the judge to order the compounding of interest. In essence, this is an incitement to ignore longstanding Board precedent. On numerous prior occasions, I have expressed my concern about this litigation tactic of seeking such relief from administrative law judges who are clearly not authorized to grant it. For example, see *Frye Electric, Inc.,* 352 NLRB 345, 358 (2008). Nothing has changed. It is clear that the Board continues to reject the General Counsel's position. See, *Transportation Solutions,* 355 NLRB No. 22, fn. 6 (2010), citing *Rogers Corp.,* 344 NLRB 504 (2005). Thus, it remains improper for me to consider the General Counsel's request for the reasons explained in *Frye.*

Company and the mailing of the notice to all employees working for the Company as of January 1, 2009. As the trial drew to its conclusion, I observed to the lawyers that such remedies are unusual and that, "I certainly need to understand why that's being sought and what legal justification there is for the remedy." (Tr. 331.) I requested that such matters be addressed in the posttrial briefs.

There are three separate items involved in the General Counsel's request regarding the notice. First, he seeks a Spanish language version of that document.[31] The Board grants such relief when the evidence demonstrates that it is necessary to provide effective communication with the particular work force involved in the case. Compare: *Carson Trailer,* 352 NLRB 1274, fn. 3 (2008) (Spanish notice ordered where "most of the employees" were Spanish speaking and numerous witnesses testified through an interpreter), and *B & M Linen Corp.,* 338 NLRB 5, fn. 2 (2002) (Spanish notice ordered where "a majority of the Respondent's employees are primarily Spanish speaking") with *Ishikawa Gasket America,* 337 NLRB 175, 177 (2001), affd. 354 F.3d 534 (6th Cir. 2004) (request for Spanish notice refused where there is "no claim or showing in this case that this Spanish provision is needed to address the needs of the affected employees").

In the present case, witnesses called by both sides reported that a substantial portion of the Company's work force spoke Spanish. Both of the victims of the Employer's unlawful discrimination testified with the assistance of an interpreter. Perhaps most significantly, Foreman Torres testified that the Company issued written communications to its work force regarding the Union's organizing campaign in Spanish. Based on this record, I conclude that the posting of a translation of the appropriate notice into the Spanish language is necessary to ensure that the affected employees are able to comprehend the contents.[32]

The General Counsel also seeks an order that the notice be read to employees by a representative of the Company and that this reading be conducted in the Spanish language. In my view, forcing a private party to make a public reading of a script written by a governmental authority should be treated as an unusual remedy in light of our traditions of individual liberty. The Board certainly acknowledges that this remedy is "special" and "extraordinary." *Homer D. Bronson Co.,* 349 NLRB 512, 515 (2007), enf. 273 Fed. Appx. 32 (2d Cir. 2008), and *Texas Super Foods,* 303 NLRB 209 (1991). For this reason, such an order is only imposed in response to "egregious" misconduct. *Ishigawa Gasket,* supra, at 176. In that case, the Board refused to impose the remedy where the General Counsel did not argue that the misconduct was egregious. The same is true here. In fact, while the Employer engaged in serious acts of intimidation and discrimination, they do not rise to the level of conduct that supports this remedy. It is instructive to compare this case with *Texas Super Foods*, supra, where the reading requirement was imposed. In that case, the company's president had personally conducted a campaign of unfair labor practices that necessitated the direction of a fourth representation election. Nothing comparable is alleged in this case. In particular, the General Counsel does not represent that this Employer has any prior history of misconduct. For these

[31] Actually, the request appears to be that the notice be read in Spanish. While not specifically requested, I will construe this as including a request that the notice be posted in a Spanish version as well.

[32] The Board's standard language regarding notice postings indicates that the notices are to be provided to the Respondent by the Regional Director. In my view, it is implicit in this wording that the Region will prepare the Spanish translation as well. I think it would be problematic to require a private employer to shoulder the responsibility of obtaining a correct translation of this document.

reasons, I will not recommend that the notice be read in either English or Spanish.[33]

Finally, the General Counsel seeks an order requiring that the notice be mailed to all "employees working for the Employer on January 1, 2009." (GC Exh. 1(e), p. 3.) No special justification has been furnished to support this request. The Board has ordered such relief, but only when it is justified by circumstances that are demonstrated in the record. Thus, in *Loray Corp.,* 184 NLRB 557, 558 (1970), it ordered mailing of the notice in response to "the Respondent's widespread and extensive coercive conduct." In *Charlotte Amphitheater Corp.,* 331 NLRB 1274, 1276 (2000), mailing of the notice was required because the employees worked "on a seasonal basis for a variety of employers."

In this case, I have already indicated that, without minimizing the Company's misconduct, it does not rise to the level of egregious or extensive coercion. While there is evidence that some of the Company's work force is employed intermittently, the General Counsel has not established that notice mailing is necessary to effectuate the purposes of the Act. Indeed, it presented no explanation whatsoever for its request for this unusual form of relief. On the state of this record, I would be forced to engage in speculation regarding the lack of effectiveness of the traditional posting remedy. Given the expense and effort involved in the suggested special remedy, I do not consider such speculation to be appropriate. As a consequence, I decline to recommend mailing of the notice.[34]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[35]

ORDER

The Respondent, Manning Construction, Inc., of Highland Springs, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercing, threatening, and intimidating its employees by telling them that they will probably be discharged if they talk to union representatives.

(b) Coercing, threatening, and intimidating its employees by yelling and cursing

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[33] In light of this resolution, I do not reach the issue of the appropriateness of requiring a company official to read a notice to employees in a language other than English. As a first generation citizen, I grew up with my mother's stories about her struggles to learn English while working as a dishwasher. Nevertheless, it strikes me as inconsistent with the traditional liberties inherent in our system of government to use the administrative authority of that national government to force a private party to give a reading in a foreign tongue. The same objective could be achieved by directing the reading in Spanish by a Board agent in the presence of management officials.

[34] Of course, I will employ the Board's standard notice language that includes a requirement for mailing the notice in the event the Company has ceased operation or closed the facilities involved in this case.

[35] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

at them because they are speaking with union representatives.

(c) Discharging or otherwise discriminating against Jaime Saldivar, Fredy Buezo, or any other of its employees because of their sympathies for the Union or their participation in protected union activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Jaime Saldivar and Fredy Buezo full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Jaime Saldivar and Fredy Buezo whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Jaime Saldivar and Fredy Buezo, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities and worksites in the Commonwealth of Virginia, in both English and Spanish, copies of the attached notice marked "Appendix."[36] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, copies of the notice in English and Spanish to all current employees and former employees employed by the Respondent at any time since January 1, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director a

[36] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges a violation of the Act not specifically found.

Dated, Washington, D.C. April 7, 2010

_____
Paul Buxbaum
Administrative Law Judge

JD–20—10
Richmond, VA

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT threaten, coerce, or intimidate our employees because of their union sympathies or their participation in union activities.

WE WILL NOT discharge or otherwise discriminate against Jaime Saldivar, Fredy Buezo, or any other of our employees because of their union sympathies or their participation in union activities.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed by Federal labor law.

WE WILL, within 14 days from the date of this Order, offer Jaime Saldivar and Fredy Buezo full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jaime Saldivar and Fredy Buezo whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Jaime Saldivar and Fredy Buezo, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

Manning Construction, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under

the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

103 South Gay Street, The Appraisers Store Building, 8th Floor

Baltimore, MD 21202-4061

Hours: 8:15 a.m. to 4:45 p.m.

410-962-2822.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 410-962-3113.